IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term, 1979

No. 79-517

ESCHMANN BROS. & WALSH, LTD.,

Petitioner

v.

V. MUELLER & CO.,

Respondent

PETITION FOR WRIT OF CERTIORARI

To The Court of Appeals of the State of Colorado

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717 Seventeenth Street
Denver, Colorado 80202

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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1979

PETITION FOR WRIT OF CERTIORARI

To The Court of Appeals of the State of Colorado

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioner herein, Eschmann Bros. & Walsh, Ltd., prays that a writ of certiorari issue to review the Judgment and Opinion of the Court of Appeals of the State of Colorado which became the final judgment of the highest court of said State in which decision could be had in the above-entitled case.

I. OPINIONS BELOW

The Judgment and Opinion of March 29, 1979, from which the Petitioner is aggreived is printed in Appendix hereto, infra, page13 bearing Colorado Court of Appeals Docket No. 78-973. It was not selected for publication and does not appear in any official report of opinions.

II. JURISDICTION

The grounds on which jurisdiction of the United States Supreme Court is invoked by Petitioner pursuant to Title 28 United States Code, Section 1257 (c) are as follows:

(i) The said Judgment and Opinion of the Colorado Court of Appeals (sought to be reviewed herein), entered on March 29, 1979, reversed an Order of the lower District

Court quashing service of process on the Petitioner herein and dismissing the Third-Party Complaint of Respondent on the sole and only ground of lack of *in personam* jurisdiction over the Petitioner. A timely Petition for Rehearing was filed on April 11, 1979, and denied by Order of said Court of Appeals on April 19, 1979 (Appendix, page 17). On April 24, 1979, the same court entered an Order, pursuant to Motion of Petitioner, staying issurance of Mandate until disposition of writ of certiorari to the Colorado Supreme Court. (Appendix, page 18).

The procedure for review of the said judgment to the highest court of the State of Colorado, namely, the Colorado Supreme Court, is specified in C.R.S. (Colorado Revised Statutes) 1973, 13-4-108, and in the Appellate Rules of said court, to be writ of certiorari. Pursuant thereto, the Petitioner timely filed on May 18, 1979, its Petition for writ of certiorari with the Colorado Supreme Court, Case No. 79 SC 164, to review the said Judgment and Opinion. By Order entered on July 2, 1979, (Appendix, page 19) the said Petition was denied by the Colorado Supreme Court and, on July 10, 1979, the Colorado Court of Appeals issued a Mandate (Appendix, page 20), reversing the lower District Court Order quashing service of process on Petitioner and its dismissal of the Third-Party Complaint of Respondent. On July 17, 1979, the Petitioner timely filed a Petition for Stay and Recall of the said Mandate on the grounds that Petitioner intended to file a Petition for Writ of Certiorari to this Honorable Court to review the federal constitutionality of the said Judgment and Opinion. This was granted on July 23, 1979, by Order Recalling Mandate issued by the Colorado Court of Appeals (Appendix, page 22). Summarily, the Judgment and Opinion of the said Court is a "final" Judgment of the highest court of Colorado from which a decision may be had and there exists no other means of securing a review of this case in the highest court in said State.

III. QUESTIONS PRESENTED

The basic question which is the subject of this request for review is whether the Colorado Courts may, without violating traditional notions of fair play and substantial justice in keeping

with due process under the Fourteenth Amendment of the United States Constitution in respect to the circumstances involved herein, properly exercise *in personam* jurisdiction over the Petitioner, a non-resident foreign United Kingdom corporation, in a third-party action filed by the Respondent against the Petitioner in Colorado under the Colorado long-arm statute, (C.R.S. 1973, 13-1-124 (1) (b) which, in pertinent part, reads as follows:

> "13-1-124 Jurisdiction of courts. (1) Engaging in any act enumerated in this Section by any person, whether or not a resident of the State of Colorado, either in person or by an agent, submits such person, and, if a natural person, his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> (b) The commission of a tortious act within this state;

The question, as applied to similar statutes, is one in which State courts of diverse jurisdiction have not heretofore reached similar results and, as applied to the circumstances herein, the Petitioner believes the decision is probably not in accord with applicable decisions of this Court.

Personal service of summons was made on Petitioner in England; however, the Petitioner has not entered a general appearance herein.

The Respondent, also a non-resident of Colorado, is one of several Defendants in a pending main action involving product liability in the lower District Court for the City and County of Denver. Neither the Plaintiff or any of the other Defendants in the main action have ever sought to invoke jurisdiction over this Petitioner and, hence, are not interested parties in this or in the appellate proceedings as mentioned above. The said District Court in Colorado entered an Order quashing the service of process on Petitioner and dismissed the Respondent's Third-Party Complaint against the Petitioner for lack of *in personam* jurisdiction. In reversing, the Colorado Court of Appeals in its Opinion on which the said Judgment is based held that the allegations of the Third-Party Complaint, coupled alone with an

admission in Affidavit (Appendix, page 24) filed by Petitioner to the effect that it sold goods to the Respondent and other United States customers in England, were sufficient to justify the exercise of personal jurisdiction in the State of Colorado in applying the said long-arm statute. The allegations of Respondent's Third-Party Complaint, which invoked the said statute were unsupported and unverified and are, in Petitioner's view, insufficient, even when coupled with the said admission, to bestow personal jurisdiction over the Petitioner in keeping with "traditional notions of fair play and substantial justice" necessary to due process and jurisdiction as ennunciated by this Court in *International Shoe,* 326 U.S. 310 (1945), and its progeny.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Traditional notions of fair play and substantial justice, under due process requirements of the Fourteenth Amendment to the Constitution of the United States of America reading, in part, as follows:

> "***nor shall any State deprive any person of life, liberty, or property, without due process of law."

require an interpretation of the above quoted Colorado long-arm statute (C.R.S. 1973, 13-1-124 (1) (b) which does not offend these principles.

V. STATEMENT OF THE CASE

The Plaintiff in the main product liability action is a resident of Colorado who alleged, in her Amended Complaint, that she sustained injury from the use of a filiform bougie, a medical instrument used in esophageal dilatation, when the tip broke off the instrument. She alleged, in this connection, that the Respondent herein designed, assembled, manufactured, and tested the instrument. In its Answer and Third-Party Complaint against the Petitioner herein, Respondent alleged that if any defect existed in

the instrument, it was in the tip component thereof manufactured by the Petitioner. The jurisdictional allegations (unsupported) of the Respondent with respect to the Colorado long-arm statutory provision as mentioned, are that the Petitioner manufactured the purportedly defective tip of the instrument; that the tip was expected to and did reach the Respondent without any substantial change in its condition; that the tip was not fit for the ordinary purpose for which it was to be used; that the use that was made of the tip was forseeable by the Petitioner; that the Petitioner sold the tip to Respondent, which has offices in the United States; and that the injury alleged in the Plaintiff's Complaint to have occurred in Colorado resulted from the use of the tip.

In support of its Motion to Quash Service of Process against it for lack of *in personam* jurisdiction, the Petitioner herein challenged the jurisdictional allegations by filing a supporting Affidavit (Appendix, page 24) which was uncontested by the Respondent and which recites that it is organized and registered under the laws of the United Kingdom; that it is not registered in and does have an office in any of the States of the United States; that it is a manufacturing and exporting company of certain products that, on receipt of orders, are sold in and from the United Kingdom and exported to foreign customers as well as sold to customers within the United Kingdom; that it does not have or maintain any regular agents, employees or salespersons in any of the States of the United States or in the State of Colorado; that, to the best of Affiant's knowledge, information and belief, its representatives have only been engaged occasionally in visiting, on an infrequent and isolated basis, its customers, past, present or future in several of the States, including the office of Respondent in Chicago, Illinois from which it received orders spasmodically from time to time; that it has no knowledge, understanding, or means of control as to where and to whom its customers in the United States, such as the Respondent in Illinois, might re-sell the goods sold to them and, indeed, that any such re-sales could have been entirely within the State of destination, namely Illinois.

Further, the Third-Party Complaint herein makes no allega-

tion that any tortious act or omission of Petitioner actually occurred "within the State of Colorado." It is merely alleged that the use of the bougie tip (sold to Respondent) by the injured Plaintiff, a resident of Colorado, was forseeable.

VI. THE FEDERAL QUESTION HEREIN WAS TIMELY RAISED

The question that the Colorado courts lack *in personam* jurisdiction over the Petitioner herein because of the requirements of due process and the decisions of this Court in *International Shoe,* supra, and its progeny, was raised (as appear in the full transcript of proceedings) initially by written brief before the District Court of Colorado and, thereafter, by written brief (and in oral argument) presented to the Colorado Court of Appeals, and, thereafter, by its written statement of the case and argument presented to the Colorado Supreme Court in its Petition for Writ of Certiorari to the Colorado Court of Appeals. As indicated above, the lower district Court quashed the service of summons and dismissed the Third-Party Complaint. The Respondent appealed to the Colorado Court of Appeals for a reversal. The Petitioner, in its written brief to that Court, as well as later on to the Supreme Court of Colorado, questioned the propriety of the Respondent's appeal to the intermediate Court of Appeals instead of directly to the Colorado Supreme Court under the Colorado Rules of Appellate Practice, but nevertheless raised the federal constitutional question as herein presented.

In its Judgment and Opinion, the Colorado Court of Appeals did not specifically discuss the federal question and it is unknown to the Petitioner whether or not the Supreme Court of Colorado gave consideration to the question in entering its Order denying the Petition for Writ of Certiorari to the Colorado Court of Appeals, it appearing that no written memorandum or opinion was issued in connection with the said Order. It is to be noted, however, that in its Judgment and Opinion as aforesaid, the Colorado Court of Appeals made specific reference to certain reported decisions of the Colorado Supreme Court wherein due process under the United States Constitution was considered in

relation to the same provision of the Colorado long-arm statute as is involved in this case. The said decisions of the Colorado Supreme Court (cited elsewhere herein) held that mere unsupported allegations of a complaint, whether true or false, are to be taken as *prima facie* true and correct for purposes of assuming the exercise of *in personam* jurisdiction by the Colorado courts in cases involving product liability. These decisions will be discussed in the argument below and, for purposes here, it may be fairly assumed that both the Colorado Court of Appeals and the Colorado Supreme Court considered such decisions to be despositive and final with respect to the circumstances in this case.

VII. ARGUMENT

The Petitioner does not believe the Judgment and Opinion of the Colorado court herein is in accord with the requirements of this Court on the federal constitutional question involved. The exercise of personal jurisdiction over the Petitioner herein by the forum State of Colorado is lacking in any factual supporting basis of determination as would show that "fair play and substantial justice" was accorded to the Petitioner within the meaning of *International Shoe,* supra. Since the establishment of that standard, subsequent decisions of this Court have further refined the criteria as requisite to its compliance in terms of due process of law and the Fourteenth Amendment to the Constitution of the United States. This includes the criteria that the non-resident party have "minimum ties, contacts, or relations with the forum State, and that it be shown that the Defendant has 'purposefully availed itself of the priviledge of conducting activities within the forum State' ". See *Hanson v. Denkla,* 357 U.S. 235, 2 L.Ed. 1283; *Shaffer, et. al. v. Heitner,* 433 U.S. 186 (1977).

As mentioned previously, there are no allegations herein or supporting proof that any tortious act of Petitioner occurred "within the State of Colorado" (see the heretofore quoted Colorado long-arm provision), but rather it is only alleged that the use of the tip manufactured by Petitioner by the injured party

in Colorado was foreseeable. It appears to this Petitioner that this Court has not heretofore specifically held that mere unsupported and unverified allegations of jurisdiction in a Complaint, when challenged on the basis of fact, measure up to the standard and criteria as mentioned. Essentially, this is the crux of the issue here. As to be discussed below, the Colorado Supreme Court has heretofore held that unsupported allegations are *prima facie* sufficient for purposes of *in personam* jurisdiction in specific relation to the federal question involved here, and (as mentioned above) its decisions on this are cited in the Opinion of the Colorado Court of Appeals in this case. Unsupported and unverified allegations, however, immediately bring into play the federal question and it is unreasonable to suppose that this Court, even if the allegations themselves had been sufficient to indicate that a tortious act of Petitioner occurred within the forum State, ever intended that the constitutional standard and criteria as mentioned could be met simply on the strength of self-serving allegations of one pleader. They simply fall short of the standard by bestowing upon the one pleader alone the unilateral right to pre-empt, and to therefore usurp, judicial inquiry, balance and determination on the question of the existence and sufficiency of jurisdictional facts. It follows, as well, that judicial inquiry into the question of fair play and substantial justice in a particular case is similarly pre-empted and usurped if such a rule is to prevail. Cases reviewed since *International Shoe* quite uniformly display this Court carefully weighing and balancing factual criteria over and beyond mere allegations in one form or another, and are not constrained by one party's pleading alone in determining whether the standard and the criteria have been satisfied. Supporting factual presentations are looked to as being highly relevant rather than superfluous to allegations of a pleader. It is the right and obligation of the Courts, as a matter of judicial inquiry, to determine whether the standard and the criteria have been met. The whole idea of "fair play and substantial justice" carries the strong connotation that the allegations should be sufficiently supported by the pleader, rather than being left to some presumption that they are to be construed as true and correct, particularly in this case where this Petitioner filed an Affidavit controverting the allegations to show that it has no contact, tie, or relation, or to show that it did

not purposefully avail itself of the jurisdiction of the forum State.

While it lies within the province of the Colorado Courts to construe the Colorado long-arm statute, its interpretation is subject to this Court's interpretation of the applicable federal constitutional requirements. It is to be again noted that the Supreme Court of Colorado has rendered a line of recent decisions in this regard which were referred to by the Colorado Court of Appeals in its Opinion herein. Thus in *Alliance Clothing, Ltd. v. District Court,* 532 P.2d 351 (1975) the Colorado Supreme Court, in its interpretation of the said long-arm statute and the due process clause of the federal constitution, said that it did not know what evidence, in any, was presented by the Plaintiff to support the allegations under the statute. Referring to its earlier decision in *Texair Flyers, Inc. v. District Court,* 180 Colo. 432, 506 P. 2d 367 (1973), the Court said:

> "It does not offend traditional notions of fair play and substantial justice to expect a foreign manufacturer who places his product in the streams of commerce and can foresee that his product will be used *in the United States,* to defend an action brought to recover for injuries allegedly caused by that product." The language in these cases (citing cases of other jurisdictions) seems to indicate that due process would be denied the alien manufacturer if he was subjected to jurisdiction merely because a tort was committed in the state. *However, if it is also forseeable to the foreign manufacturer that his product would be used in the United States, then the Defendant's due process rights are not violated.* (Italics supplied.)

The dissenting opinion in the said *Alliance* case took exactly the opposite position to say that due process and the traditional notions of fair play and substantial justice set out in *International Shoe Company v. Washington,* 326 U.S. 310, and *Hanson v. Denckla,* supra, are violated by the results reached in the case. It was stated in the dissent, as follows:

> "I do not read *Texair Flyers, Inc. v. District Court,* as authority for the extention of jurisdiction under our long-

arm statute to the acceptance of a mere allegation of negligence, or other tortious conduct, as basis for the finding that *in personam* jurisdiction exists *on a world-wide basis.* (Italics supplied.)

It is of interest to note that the *Alliance* decision, supra, cited as authority by the Colorado Court of Appeals, referred to a products liability decision of the Ninth Circuit Court of Appeals against an alien corporation in *Duple Motor Bodies, Ltd. v. A. Hollingsworth,* 417 F.2d 231 (1969). In addressing the constitutional question, the court referred to conflicting cases on the subject and emphasized that the foreign manufacturer knew that its product was to be used in Hawaii, the forum state and, indeed, adapted the product for special use there, in addition to soliciting and responding directly to orders from Hawaii. In this case, there is neither allegation or supporting evidence of direct foreseeability or activity with respect to the forum state of Colorado. While this Petitioner points to the distinction between the said decision of the Ninth Circuit and the decision in this case, it believes the strong dissent in the Ninth Circuit case states the correct position from the constitutional standpoint, as follows:

"The application of this concept of fairness *rests upon a factual determination in each case* of whether the defendant's conduct has been sufficient to justify the fiction that he has 'given (his) consent to service and suit, consent being implied from (his) presence in the state through the acts of (his) authorized agents.' One towering point in all the significant litigation on this subject is that *the activity of the defendant and not the reach of the jurisdictional statute is of paramount importance in the resolution of the due process problem."* (Italics supplied.)

And further:

"It has been suggested that a cause of action based on products liability should be differentiated from other causes of action and that innovation of the privilege of doing business within the forum state should be irrelevant. This proposition is based on the tenet that the manufacturer

should bear the risk of any loss occasioned by his product wherever that product may be carried by the natural flow of commerce. I cannot believe, however, that the acceptance of such a broad proposition could comport with the due process. Moreoever, the oppression of such a rule is inconsistent with my notion of fundamental fairness in relation to a manufacturer, such as Duple here, whose product might reach a particular forum in an isolated instance."

And, in further reference to the landmark case of *International Shoe v. Washington,* this Court in *Shaffer, et. al. v. Heitner,* supra, said: "Due process requires only that in order to subject a Defendant to a Judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice . . ." In *Hanson v. Denckla,* supra, this Court also said: "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

It is also of interest to note that, in construing the said statute, the Colorado Supreme Court had two clear lines of authority which it could follow. The first is to be found in the decision by the New York Court of Appeals in *Feathers v. McLucas,* 15 N.Y.2d 443, 209 N.E.2d 68, (1965), which construed a statute substantially the same as that of Colorado. It was held that New York court jurisdiction could extend to foreign corporations not doing business in New York only if the "tortious conduct" occurred in New York, and that injury alone, without acts of conduct, were insufficient for jurisdiction over the person of the defendant. The alternative line of authority was the liberal theory evolving out of *Gray v. American Radiator Sanitary Corporation,* 22 Ill. 2d 432, 176 N.E.2d 761 (1961), where the Illinois Court defined "tortious act" as a continuum of events.

VIII CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petitioner's request herein for writ of certiorari be granted.

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APPENDIX
OPINION AND JUDGMENT AS BASIS FOR WRIT OF CERTIORARI

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COLORADO COURT OF APPEALS
NO. 78-973

LAURA LOUISE BYRD,

Plaintiff,

v.

DONALD G. BUTTERFIELD, M.D.,
JOSEPH L. KOVARIK, M.D.,
PRESBYTERIAN MEDICAL CENTER,
and V. MUELLER AND CO.,

Defendants,

and

V. MUELLER AND CO.,

Defendant and Third-Party Plaintiff-Appellant,

v.

ESCHMANN BROS. & WALSH LIMITED,

Third-Party Defendant-Appellee.

Appeal from the District Court of the City and County of Denver

Honorable Mitchel B. Johns, Judge

DIVISION III OPINION BY JUDGE SMITH
Ruland and Sternberg, JJ., concur

JUDGMENT REVERSED AND
CAUSE REMANDED WITH
DIRECTIONS

Lowell Fortune, P.C.
Jeffrey H. Thorpe
Denver, Colorado

Attorney for Defendant and
Third-Party Plaintiff-Appellant

James E. Horigan
Denver, Colorado

Attorney for Third-Party
Defendant-Appellee

The third-party complaint which is the subject of this appeal arises from a medical malpractice and products liability action. Plaintiff Byrd claims that she sustained injury arising from the use of a filiform bougie, a medical instrument used in esophageal dilation, when the tip of the instrument broke off and lodged in her body.

Byrd in her complaint included claims against defendant V. Mueller and Company (Mueller), alleging that Mueller manufactured the filiform bougie and is liable to the plaintiff under a theory of products liability. Mueller answered and filed a third-party complaint against Eschmann Brothers and Walsh Limited (Eschmann), alleging that if any defect existed in the filiform bougie, such defect was in the tip of the instrument which was manufactured by Exchmann. Mueller appeals from an order entered by the trial court quashing service upon Eschmann and from judgment entered pursuant to C.R.C.P. 54(b) directing final dismissal of the third-party complaint. We reverse.

Eschmann is a foreign corporation with its principal offices located in London, England. Service of process was effected in that city. Eschmann entered a special appearance and filed a motion to quash service of process for lack of personal jurisdiction. The motion was later amended to include a request that the third-party complaint be dismissed for lack of jurisdiction over the person. Mueller argues on appeal that Eschmann is subject to the "in personam" jurisdiction of this state's courts pursuant to §13-1-124 (1) (b), C.R.S. 1973. We agree.

Eschmann asserts initially that this court has no jurisdiction to review the order of the district court quashing service for lack of "in personam" jurisdiction. Eschmann relies upon *Cranmer v. Olin Ski Co.*, 35 Colo. App. 371, 533 P.2d 501 (1975) wherein this court held that an order which merely quashed service of summon wa not an appealable order because it was only interlocutory in nature. In *Cranmer,* the case in which the defective service had occurred was still pending; here, however, pursuant to C.R.C.P. 54(b), the trial court directed that judgment of dismissal of the third-party action be entered. And, an order of dismissal is to be treated as a judgment for the purposes of taking an appeal when, as here, it finally disposes of the particular action and prevents further proceedings as effectively as would any formal judgment. *Levine v. Empire Savings & Loan Assn.*, _____ Colo. _____, 557 P.2d 386 (1976). Thus the issue comes to us as a proper appeal from a final judgment of dismissal. *Jenkins v. Glen & Helen Aircraft, Inc.*, _____ Colo. App. _____, _____ P.2d _____ (No. 77-1009 announced 1-25-79).

In its motion Eschmann urged that the complaint should be dismissed because the Colorado court had no basis upon which to invoke its Long Arm jurisdiction. One who asserts jurisdiction under the Long Arm statute, §13-1-124, C.R.S. 1973, has the burden of alleging sufficient facts to support that jurisdiction. *See Texair Flyers, Inc. v. District Court,* 180 Colo. 432, 506 P.2d 367 (1973). Mueller, thus, was required to allege that Eschmann was guilty of tortious conduct; that the conduct complained of resulted in injury which occurred in Colorado; that the injury

complained of resulted from a use of the product, intended or foreseeable, by Eschmann; and that Eschmann could reasonably have foreseen that its product would be used in the United States or Colorado. *Jenner & Block v. District Court,* _____ Colo. _____, _____ P.2d _____, (#28226 announced February 26, 1979); *Alliance Clothing Ltd. v. District Court,* 187 Colo. 400, 532 P.2d 351 (1975).

Mueller alleged in its third party complaint that Eschmann manufactured the purportedly defective tip of the filiform bougie; that the tip was expected to and did reach Mueller without any substantial change in its condition; that the tip was not fit for the ordinary purpose for which it wa to be used; that the use that was made of the tip was foreseeable by Eschmann; that Eschmann sold the tip to Mueller, which has offices in the United States; and that the injuries which were alleged in the plaintiff's complaint to have occurred in Colorado resulted from the use of the tip. Furthermore, in an affidavit submitted by Eschmann in support of its motion to quash, Eschmann's corporate secretary admits that Eschmann sold its goods to Mueller and other customers in the United States. Taken in sum, these allegations and admissions are sufficient to justify the exercise of jurisdiction by the Colorado court under the Long Arm statute. *Alliance Clothing, supra.*

It also appears from the record that Eschmann was served with process together with a copy of the third-party complaint at its London office by personal service upon Eschmann's corporation secretary. The form of the service was sufficient to satisfy the requirements of §13-1-125, C.R.S. 1973, and C.R.C.P. 4.

The district court therefore erred in granting the motion to quash and in dismissing the third-party complaint for lack of jurisdiction over the person of Eschmann.

The judgment of dismissal is reversed and the cause is remanded with directions to reinstate the third-party complaint and the service of process and for further proceedings.

JUDGE RULAND and JUDGE STERNBERG concur.

(ORDER DENYING REHEARING)

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IN THE COURT OF APPEALS OF
THE STATE OF COLORADO

No. 78-73

LAURA LOUISE BYRD,

Plaintiff

vs.

DONALD G. BUTTERFIELD, M.D., et al,

Defendants,

vs.

MUELLER AND CO.,

Defendant and Third Party
Plaintiff-Appellant

vs.

ESCHMANN BROS. & WALSH LIMITED,

Third Part Defendant-Appellee.

Upon consideration of the Petition for Rehearing filed by the APPELLEE herein, said Petition is hereby DENIED. Unless otherwise ordered MANDATE will issue 4-26-79.*

BY THE COURT,
JUDGES SMITH, RULAND AND STERNBERG

Dated: 4-19-79

If certiorari to the Supreme Court is planned and a stay of issuance of mandate desired, petition for such stay must be filed in the Court of Appeals prior to the above date of issue.

(ORDER STAYING MANDATE)

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IN THE COURT OF APPEALS, STATE OF COLORADO

No. 78-973

LAURA LOUISE BYRD,

Plaintiff,

vs.

DONALD G. BUTTERFIELD, M.D., et al,

Defendants,

vs.

MUELLER AND CO.,

Defendant and Third Party Plaintiff-Appellant,

vs.

ESCHMANN BROS. & WALSH LIMITED,

Third Party Defendant-Appellee.

Upon consideration of the Motion for Stay of Mandate filed in this case, it is this day ordered that issuance of the Mandate herein be, and the same hereby is, stayed to and including MAY 21, 1979, provided that if Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

FOR THE COURT OF APPEALS:

JUDGES SMITH, RULAND AND STERNBERG

DATED: 4-24-79

(ORDER DENYING PETITION FOR WRIT OF CERTIORARI)

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IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 79 SC 164 April Term, 1979

ESCHMANN BROS. & WALSH LIMITED,

Petitioner,

vs.

V. MUELLER AND CO.,

Respondent.

} Certiorari to the Colorado Court of Appeals 78-973

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

July 2, 1979

By the Supreme Court
Sitting En Banc

(MANDATE)

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COLORADO COURT OF APPEALS
State of Colorado
2 East Fourteenth Avenue, Suite 310
Denver, Colorado 80203
(303) 861-1111

July 10, 1979

LAURA LOUISE BYRD,

Plaintiff,

vs.

DONALD G. BUTTERFIELD, M.D.,
JOSEPH L. KOVARIK, M.D.,
PRESBYTERIAN MEDICAL CENTER,
and V. MUELLER AND CO.,

Defendants,

vs.

MUELLER AND CO.,

Defendant and Third Party
Plaintiff-Appellant,

vs.

ESCHMANN BROS. & WALSH LIMITED,

Third Party Defendant-
Appellee

This cause came on to be heard on the record on appeal from the District Court of the City and County of Denver, and was argued by counsel, on consideration whereof, it is ordered that the judgment of said Court is REVERSED AND REMANDED WITH DIRECTIONS. ORDER COSTS TAXED PER CAR 39, in the amount of $35.00 TO BE PAID THROUGH THE REGISTRY OF THE DENVER DISTRICT COURT.

MAC V. DANFORD,
Clerk of the Court

(RECALL OF MANDATE)

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IN THE COURT OF APPEALS
OF THE STATE OF COLORADO

No. 78-973

LAURA LOUISE BYRD,

Plaintiff,

vs.

DONALD G. BUTTERFIELD, M.D., JOSEPH L. KOVARIK, M.D., PRESBYTERIAN MEDICAL CENTER, and V. MUELLER AND CO.,

Defendants,

vs.

MUELLER AND CO.,

Defendant-and Third Party
Plaintiff-Appellant,

vs.

ESCHMANN BROS. & WALSH LIMITED,

Third Party Defendant-
Appellee.

ORDER
RECALLING MANDATE

78-973
TRIAL COURT NUMBER C-58835

Upon the Court's own Motion it is this day ordered that the Mandate issued July 10, 1979, is RECALLED.

BY THE COURT: DAVID W. ENOCH, CHIEF JUDGE.

DATED: July 23, 1979.

(AFFADAVIT/AFFIRMATION)

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UNITED KINGDOM OF GREAT BRITAIN

CITY OF LONDON ENGLAND } SS

CITY OF LONDON ENGLAND

I, ROBERT ANTHONY DUFF URQUHART, of the City of London, England, Notary Public duly admitted and sworn, practising in the said City,

DO HEREBY CERTIFY AND ATTEST:

THAT on the day of the date hereof before me personally came and appeared PAMELA BULL, the Affirmant named and described in the hereunto annexed Affirmation, who signed the same in my presence and by solemn affirmation which she then made before me in due form of English Law, she did affirm to be true the several matters and things in the said Affirmation contained.

IN TESTIMONY WHEREOF I have hereunto set my Hand and affixed my Seal of Office in the City of London aforesaid this seventh day of July One thousand nine hundred and seventy-eight.

S/ANTHONY DUFF URQUHART
NOTARY PUBLIC OF LONDON, ENGLAND

My Commission expires with Life

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
AND STATE OF COLORADO

CIVIL ACTION No. C-58835

COURTROOM 7

LAURA LOUISE BYRD — *Plaintiffs*

vs.

DONALD G. BUTTERFIELD, M.D.
JOSEPH L. KOVARIK, M.D.
et. al. — *Defendants*

V. MUELLER AND CO. — *Defendant and Third Party Plaintiff*

vs.

ESCHMANN BROS. & WALSH LIMITED — *Third Party Defendant*

AFFIRMATION OF THIRD PARTY DEFENDANT IN SUPPORT OF MOTION TO QUASH

COMES NOW the Third Party Defendant, ESCHMANN BROS. & WALSH LTD., by and through its attorneys Burns & Wall, and in support of its Motion to Quash herein respectfully submits the following Affirmation:

I, Pamela Bull, of 14 Gresham Road, Houslow, Middlesex, England do solemnly and sincerely affirm as follows:

1. That I am the Company Secretary of Eschmann Bros. & Walsh Limited.

2. That Eschmann Bros. & Walsh Limited (Eschmann) is organised and registered under the laws of the United Kingdom.

3. That Eschmann is not registered in and has no office in any of the States of the United States.

4. That Eschmann is a manufacturing and exporting company of certain products that, on receipt of orders, are sold in and from the United Kingdom and exported to foreign customers as well as sold to customers within the United Kingdom.

5. That Eschmann does not have or maintain any regular agents, employees or salespersons in any of the States of the United States or in the State of Colorado.

6. That, to the best of my knowledge, information and belief Eschmanns representatives have only been engaged occasionally in visiting, on an infrequent and isolated basis, Eschmann's customers past present or future in several of the States of the United States, including V. Mueller at Chicago, Illinois from which it received orders spasmodically from time to time up to mid-1976.

7. That Eschmann has no knowledge understanding or means of control as to where and to whom its customers in the United States such as V. Mueller in Chicago might re-sell the goods sold to them up until such time. For example it may be that any such re-sales could have been entirely within the State of destination namely Illinois.

8. That Eschmann has not contracted to insure any person, property or resident within the state of Colorado.

Affirmed at 27 Cockspur St.
in the City of London, England,
the 7th day of July, 1978.

Before me,

S/ANTHONY DUFF URQUHART
NOTARY PUBLIC OF LONDON, ENGLAND

My Commission expires with Life